

**GOOGLE LLC'S MOTION
IN LIMINE NO. 4 TO
EXCLUDE EVIDENCE
AND ARGUMENT
REGARDING THE
JOINING OF
AUTHENTICATED AND
UNAUTHENTICATED
DATA**

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**

CHASOM BROWN, *et al.*, individually and
on behalf of themselves and all others
similarly situated,

Plaintiffs,

v.

GOOGLE LLC,

Defendant.

Case No. 4:20-cv-03664-YGR-SVK

**GOOGLE LLC'S MOTION *IN LIMINE*
NO. 4 TO EXCLUDE EVIDENCE AND
ARGUMENT REGARDING THE
JOINING OF AUTHENTICATED AND
UNAUTHENTICATED DATA**

Hon. Yvonne Gonzalez Rogers

Trial Date: January 29, 2024

1 I. INTRODUCTION

2 Plaintiffs filed this case on the false premise that Google creates “cradle-to-grave profiles”
 3 by linking users’ signed-out (“unauthenticated”) private browsing data to their Google Accounts
 4 along with their signed-in (“authenticated”) regular mode browsing data. FAC ¶ 54. The voluminous
 5 record contains *no* evidence of this. That reality has not discouraged Plaintiffs. Thus, Google moves
 6 pursuant to Federal Rules of Evidence 402 and 403 to exclude argument that Google joins
 7 unauthenticated and authenticated data—or that it *could* do so.

8 Throughout this litigation, Plaintiffs steadfastly alleged that Google built “cradle-to-grave
 9 profiles” that “associate” PBM Data “with the user’s ‘Google profile.’” FAC ¶¶ 54, 69, 91–112;
 10 2/25/21 MTD Hrg. Tr. 35:17-20 (Mr. Lee: ... the Plaintiffs have alleged, in probably a dozen
 11 paragraphs, how the private browsing data gets linked to the user profile.”). Discovery has proven
 12 them wrong. Plaintiffs now appear to have pivoted to a plan to present evidence regarding what
 13 Google “could” do with the data it receives. But Google’s *capability* to join does not prove or
 14 disprove Plaintiffs’ claims, and would only serve to confuse the jury. Such arguments necessarily
 15 involve complicated technical issues that would waste much trial time, and would be highly
 16 prejudicial to Google. Evidence and argument related to that hypothetical should be excluded.

17 II. BACKGROUND

18 A. Plaintiffs Plan to Present Evidence to Improperly Suggest Google Join Data

19 Plaintiffs’ recent disclosures indicate that they will seek to introduce evidence and argument
 20 at trial to improperly suggest to the jury that Google joins authenticated and unauthenticated data.
 21 *See, e.g.*, Gao Decl. Ex. A (Plaintiffs’ Rule 1006 Summary re: the data that Google collects on non-
 22 Google websites that were visited in a private browsing mode) at PDF 4 (“the same Analytics User
 23 ID can join data from Incognito and non-Incognito browsing”); *id.* (“these [Incognito] events can
 24 be joined with a user’s device and/or the user’s GAIA ID”); Dkt. 985-2 (6/20/23 Hochman Second
 25 Supp. Rep.) ¶ 43 (“Google argues that ‘authenticated and unauthenticated records in that file are
 26 never joined’. This raises the question of why Google calls the log a ‘[REDACTED]’ but claims there
 27 is no joining.”) (internal citations omitted); *id.* ¶ 45 (“The structure of this [REDACTED]’ also
 28 reinforces my opinions about how private browsing data is identifying. ... time ordered sequences

1 of events from a user’s signed-out private browsing and signed-in browsing ... may appear in
 2 sequential order, linking the signed-out private browsing data with the user’s GAIA ID.”).

3 **B. There Is No Evidence that Google Joins Data**

4 Years of discovery and voluminous expert reports have confirmed Google does not join a
 5 user’s unauthenticated private browsing data with any authenticated data. Plaintiffs have not
 6 uncovered a *single* instance of such joining, much less a systematic effort or process for doing so.
 7 Dkt. 907–4 at 9-10. This is because the undisputed record confirms that Google has policies against
 8 such joining, as well as technical and procedural safeguards in place to enforce the policy. *See*
 9 *e.g.* Dkt. 659–7 ¶ 5. Plaintiffs themselves admitted to the Court that their “smoking gun” Google
 10 log does not actually join authenticated and unauthenticated data:

11 Mr. Boies: Sure. Now, with respect to the [REDACTED], your Honor, we do not have evidence
 12 that they joined them in the sense that they want to use the word ‘joined.’ ... The fact that
 they are together shows *they could*.

13 *See* Dkt. 905-3 (3/2/23 Hrg. Tr.) at 65:25-66:3 (emphasis added). And their experts agree that there
 14 is no evidence of joining by Google. Dkt. 908-4 (Ex. 59, Schneier Tr.) 112:6–20 (“Q. ... Have you
 15 seen any evidence that Google has actually [joined data from a private browsing session with data
 16 from a regular mode browsing session]? A. I have not seen evidence about what Google does.”);
 17 Dkt. 908-4 (Ex. 61, Hochman Tr.) 88:9-89:12 (“Q. ... Mr. Hochman, do you opine that Google uses
 18 fingerprinting techniques for cross-site tracking? A. At a minimum, I talk about the data that Google
 19 is collecting and retaining and how it *could* be used for fingerprinting.”).

20 Without any evidence of joining, Plaintiffs instead argue a hypothetical—that Google *could*,
 21 in theory, do so. Dkt. 908-4 (Ex. 59, Schneier Tr.) 112:18 (“Really, my report is about what [Google]
 22 *could* do.”) (emphasis added); Dkt. 907-7 (Hochman Rep.) ¶ 156 (“As for the private browsing
 23 information at issue in this case ... Google stores the data ... with various identifying information
 24 that *could* be linked to class members and their devices.”) (emphasis added).

25 **III. ARGUMENT**

26 **A. Allowing Evidence and Argument Regarding Google’s Hypothetical Ability to Join** 27 **Data Would Be Unfairly Prejudicial**

1 There is no probative value in allowing Plaintiffs to attempt to prove that Google is *capable*
 2 of doing something that it *forbids* and for which there is no evidence. Even if there were some
 3 marginal probative value, it would be “substantially outweighed by a danger of . . . unfair prejudice,
 4 confusing the issues, misleading the jury, undue delay, [or] wasting time. . . .” Fed. R. Evid. 403.

5 Indeed, the jury could understandably confuse what Google actually does (a fact of legal
 6 consequence) with what Google *could* do (a fact of no legal consequence). The arguments and
 7 evidence of the latter should therefore be excluded. *See Mformation Techs., Inc. v. Rsch. in Motion*
 8 *Ltd.*, 2012 WL 2339762, at *4 (N.D. Cal. June 7, 2012) (excluding reports “likely to confuse the
 9 jury by introducing a basis for evaluating damages that differs entirely from that the jury is being
 10 asked to apply”).

11 **B. Evidence and Argument Regarding Ability to Join Data Would Waste Time and**
 12 **Confuse the Jury**

13 Permitting Plaintiffs to present evidence on this topic would compel Google to respond in
 14 kind, inevitably leading to a trial-within-a-trial—protracted technical discussions about why
 15 Plaintiffs’ speculation is unfounded.

16 As just one example, in the recently served Second Supplemental Report, Plaintiffs’ retained
 17 expert Mr. Hochman focuses on one particular Google log (the same one Mr. Boies admitted does
 18 *not* join, *see supra* at 2) and asserts that “time ordered sequences of events from a user’s signed-out
 19 private browsing and signed-in browsing (with the same IP address and user agent, as well as with
 20 many of other parameters . . .) may appear in sequential order, linking the signed-out private
 21 browsing data with the user’s GAIA ID.” Dkt. 985-2 (6/20/23 Hochman Second Supp. Rep.) ¶ 45.

22 If Plaintiffs were permitted to present this expert testimony at trial, Google would have no
 23 choice but to introduce evidence and argument to rebut it, in the following ways. First, the scenario
 24 that Mr. Hochman suggests “may” is a practical impossibility because the logs accrue events by the
 25 hundreds of thousands every second and just the time it takes for a user to switch from regular mode
 26 browsing to private browsing alone would ensure that any records of that user’s activity in this
 27 particular log would be separated by thousands of events (if not more) created by other users.
 28 Second, even if a single user’s authenticated and unauthenticated browsing events did appear in the

1 log, in order, without intervening events from other users—and such an occurrence never could
2 feasibly happen—that *still* would not constitute “joining” in any relevant sense. Records that are
3 ordered sequentially by time are not “joined” because they are not combined into a single record via
4 the use of a common key. Finally, Mr. Hochman’s proposed methodology to use a combination of
5 IP address and user agent (or other pseudonymous identifiers) to link signed-out private browsing
6 mode records with signed-in non-private browsing mode records would not work because none of
7 these values can be reliably mapped to individual users. And the uncontroverted record proves that
8 Google does *not* combine IP address and user agent (or other pseudonymous identifiers) to join
9 users’ private browsing data with the regular browsing data (or their identities or device).

10 What matters in this trial is what Google *actually did*, not what Google *potentially could* do
11 if it were inclined to violate its own policies. But by the time Google is done dispelling Plaintiffs’
12 and Mr. Hochman’s implausible and completely unsupported theories, the jury will have forgotten
13 that hypothetical joining does not occur. Indeed, that is likely Plaintiffs’ intent. There can be no
14 dispute that this lengthy and technical discussion would prolong the already complex trial with a
15 nested mini-trial of essentially no relevance. *See, e.g., Tennison v. Circus Circus Enterprises, Inc.*,
16 244 F.3d 684, 690 (9th Cir. 2001) (upholding exclusion of “testimony [that] might have resulted in
17 a ‘mini trial,’ considering that much of the[] testimony was disputed by Defendants”); *Hovey v.*
18 *Cook Inc.*, 2015 WL 1405558, at *3 (S.D.W. Va. Mar. 26, 2015) (evidence of FDA regulations not
19 at issue in litigation excluded because of risk of confusing jury and potential that such evidence
20 “could also provoke the parties to engage in a time-consuming mini-trial on whether Cook in fact
21 complied with its provisions”). Therefore, evidence and argument regarding the joining of
22 authenticated and unauthenticated data should be precluded pursuant to Rule 403.

23 **IV. CONCLUSION**

24 For the foregoing reasons, the Court should exclude any evidence or argument regarding the
25 joining of authenticated and unauthenticated data.

1 DATED: October 17, 2023

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